

“Case Dismissed”—or is it? Sanctions for Failure to Participate in Court-Mandated ADR

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I. INTRODUCTION

The need to relieve courts of the ever-increasing backlogs on their dockets has been well documented. As the number of suits filed¹ and the length of time required to resolve the average case have increased, judges and litigants have increasingly turned to alternatives to trial to settle disputes.² As part of this trend,³ judges have become more willing to order the parties in a lawsuit to participate in some form of alternative dispute resolution (ADR).

While ADR programs such as mediation,⁴ court-annexed arbitration⁵ and summary jury trials (SJT)⁶ have in many instances been successful, the

¹ In 1951, a total of 55,084 cases were pending in federal district courts. *See* 1951 REPORT OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 52 (1951). By 1991, this number had risen to 240,599. *See* 1991 REPORT OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 86 (1991). While an increase in the number of judgeships has helped offset some of the burden of this increase, it has not been sufficient to keep pace with the number of cases filed.

² As one federal district court noted, “to process 400 cases you have to settle at least 350.” *Lockhart v. Patel*, 115 F.R.D. 44, 47 (E.D. Ky. 1987).

³ It must be noted that the concern over the backlog of cases is hardly a recent development. In his Report to the Judicial Conference of the United States in 1957, U.S. Attorney General Herbert Brownell, Jr. stated: “As in the past, uppermost in the minds of members of the bench, the bar and the people is the difficult matter of cutting down the law’s delays without impairment of constitutional rights.” *See* 1957 REPORT OF THE JUDICIAL CONFERENCE OF THE UNITED STATES app. at 49–51 (1957). Brownell suggested the “adoption of modernized rules of procedures such as pretrial conferences and discovery procedures to promote the orderly and expeditious trial of cases.” *Id.* While Brownell was not advocating the type of ADR procedures currently being tested today, he did understand the injustice in long-delayed trials and sought to find a solution to this problem. *See id.*

⁴ For a treatment of the special issues surrounding mandatory mediation, see *Mandatory Mediation and Summary Jury Trial: Guidelines for Ensuring Fair and Effective Processes*, 103 HARV. L. REV. 1086, 1090–1095 (1990).

⁵ In court-annexed arbitration, the parties may subpoena witnesses and testimony is heard by a panel of three arbitrators. Procedural rules are relaxed, though the Federal Rules are used as a guide and the panel makes an award immediately after trial. The

uncertainty surrounding these procedures has caused many judges and attorneys to be hesitant about participating in such proceedings.⁷ Many questions concerning ADR procedures have yet to be answered. One of the most intriguing questions, and the one this Note will attempt to answer, is what are the appropriate sanctions when a party fails to participate in court-ordered ADR.

To understand what sanctions are appropriate in a given situation, however, it is necessary to gain an understanding of several important concepts. First, what is the basis of a court's authority to mandate participation in ADR? While private, voluntary ADR raises few constitutional issues, mandated participation is seen by some as an infringement of the constitutional right to trial by jury.⁸ Part II of this Note will examine and explain a court's authority to so instruct the parties.

Second, courts have recently begun to instruct parties to "participate in good faith" and "bring bargaining authority to the table" in ADR proceedings.⁹ Such instructions often lead to confusion over what type of participation is, or even should be, required. The inherent ambiguity of the term "good faith" provides little guidance to the participants. Part III of this Note attempts to shed some light on the good faith standard.

award becomes final unless a dissatisfied party demands a formal trial de novo within a certain period, usually 30 days. See Irving R. Kaufman, *Reform for a System in Crisis: Alternative Dispute Resolution in the Federal Courts*, 59 FORDHAM L. REV. 1, 17-18 (1990).

⁶ The summary jury trial was created by Judge Thomas Lambros of the U.S. District Court for the Northern District of Ohio in 1980 and has been adopted by local rule in a number of federal district courts. See generally Thomas Lambros, *The Summary Jury Trial and Other Alternative Methods of Dispute Resolution*, 103 F.R.D. 461 (1984). In a summary jury trial, the attorneys for each side merely summarize their cases. No witnesses are called, although exhibits may be used when necessary. The procedure is nonbinding unless the parties stipulate otherwise. Hence, the SJT attempts to serve as a "crystal ball" the parties can use to predict the real jury's verdict. See Kaufman, *supra* note 5, at 14-15.

⁷ See, e.g., Ann E. Woodley, *Saving the Summary Jury Trial: A Proposal to Halt the Flow of Litigation and End the Uncertainties*, 1995 J. DISP. RESOL. 213, 254 (noting that many judges have been reluctant to order parties to participate in summary jury trials due to the courts' uncertain authority to do so).

⁸ See generally Dwight Golann, *Making Alternative Dispute Resolution Mandatory: The Constitutional Issues*, 68 OR. L. REV. 487 (1989) (discussing the constitutional issues raised by mandatory ADR).

⁹ See Part III *infra*.

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Only after understanding the source of a court's authority to mandate participation in ADR, as well as what is expected of the parties once the proceedings begin, is it possible to discuss the appropriate sanctions for failure to follow a judge's order to participate in ADR. Ours is an adversary system stressing party autonomy and the right to proceed to trial if desired. It hardly seems fair for a court to impose sanctions, however mild or severe, without clear authorization to mandate participation in ADR. Part IV of this Note examines the goals and policies behind imposing sanctions and proposes an objective standard under which appropriate sanctions may be determined.

II. COURT'S AUTHORITY TO MANDATE PARTICIPATION IN ADR

The source of a court's authority to mandate participation in nonbinding ADR is far from clear. Some courts have based such power on Rule 16 of the Federal Rules of Civil Procedure. Others, however, have suggested that Rule 16 is too ambiguous and require explicit statutory authorization to mandate ADR. Finally, a few courts have relied on their inherent authority to manage their dockets to require litigant participation.

A. Rule 16 and Statutory Authorization

As originally enacted in 1937, Federal Rule 16 suggested that the pretrial conference serve "to familiarize the litigants and the court with the issues actually involved in a lawsuit so that the parties [could] accurately appraise their cases and substantially reduce the danger of surprise at trial."¹⁰ Notably absent from this description of the original version of Rule 16 is any mention of the court's role of encouraging settlement. This was not by accident or failure of the drafters to consider the possibility. Charles Clark, a member of the original Advisory Committee for the Federal Rules, believed "[c]ompelled settlement negotiations are dangerous as bringing in question the impartiality of the tribunal,"¹¹ and "[p]re-trial used as a club to force settlements . . . will pretty surely lead to its elimination

¹⁰ 6A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1522 (2d ed. 1990).

¹¹ Charles E. Clark, *To an Understanding Use of Pre-Trial*, 29 F.R.D. 454, 456 (1962).

as its potentialities for unfairness become more apparent"¹² These comments reflect the general fear of the original drafters that too much judicial management of cases would occur. Times have changed. Since the enactment of the Federal Rules in 1937, the pretrial conference has been increasingly used to resolve lawsuits, rather than simply clarify the issues involved.

To reflect this change, Rule 16 has been amended several times since 1983, each time increasing the court's authority to encourage participation in ADR.¹³ Rule 16 now authorizes a court to "take appropriate action with respect to . . . settlement and the use of special procedures to assist in resolving the dispute when authorized by statute or local rule."¹⁴ Obviously, the drafters now intend that courts take a more active role in the disposition of cases prior to trial.¹⁵

¹² Charles E. Clark, *Objectives of Pre-Trial Procedure*, 17 OHIO ST. L.J. 163, 167 (1956).

¹³ In 1983, Rule 16 was amended, adding several provisions, including Rule 16(c)(7): "The parties at any conference under this rule may consider and take action with respect to . . . the possibility of settlement or the use of extrajudicial procedures to resolve the dispute." FED. R. CIV. P. 16(c)(7). The Advisory Committee's note stated:

[Rule 16(c)(7)] explicitly recognizes that it has become commonplace to discuss settlement at pretrial conferences. Since it obviously eases crowded court dockets and results in savings to the litigants and the judicial system, settlement should be facilitated at as early a stage of the litigation as possible [I]t is believed that providing a neutral forum for discussing [settlement] might foster it.

FED. R. CIV. P. 16 advisory committee's note. Rule 16 was also amended in 1987 and 1993. The 1987 amendments were merely technical, providing for gender neutrality with no substantive change intended. The 1993 amendment, however, altered the purpose of pretrial settlement conferences. *See infra* notes 14-15 and accompanying text.

¹⁴ FED. R. CIV. P. 16(c)(9) (as amended Dec. 1, 1993).

¹⁵ To further emphasize a trial court's authority to mandate participation in ADR proceedings, the Advisory Committee's note discussing the December 1993 amendments states: "The primary purpose of the changes in subdivision (c) are to . . . eliminate questions that have occasionally been raised regarding the authority of the court to make appropriate orders designed either to facilitate settlement or to provide for an efficient and economical trial." FED. R. CIV. P. 16(c) advisory committee's note.

Judge Charles Richey, a leading advocate of the use of Rule 16 as a method of facilitating settlement, argued persuasively that this rule authorizes and indeed instructs a federal judge to take an active role in the disposition of cases. He stated that Rule 16 contains potential for developing creative case management strategies. Judge Richey wrote: "I believe that Rule 16 is the most important rule of civil procedure for a trial

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Nonetheless, questions remain as to the extent of a federal court's authority to participate in ADR. Several courts have recognized distinct limitations on the amount of discretion this rule bestows upon a judge encouraging parties to settle before trial. One hotly contested issue, for instance, is whether a judge has the authority to order parties to participate in summary jury trials. Of the courts that have fully considered the issue, two circuit courts have held that no such authority exists,¹⁶ while four federal district courts have reached the opposite conclusion.¹⁷ Most interesting, perhaps, is the split in Ohio, where two federal district court decisions in 1996 held that a court can mandate participation in a SJT in direct contravention of an earlier Sixth Circuit decision.¹⁸

The Seventh Circuit Court of Appeals in *Strandell v. Jackson County* held in 1988 that Rule 16 does not authorize mandatory participation in SJTs.¹⁹ While the rule does encourage innovative settlement procedures, the court said, "it [is] not intended to require that an unwilling litigant be sidetracked from the normal course of litigation."²⁰ Five years later, in *In re NLO*, the Sixth Circuit Court of Appeals cited *Strandell* with approval, vacating a trial court's order to participate in a SJT.²¹ The Sixth Circuit quoted from the Advisory Committee's note to Rule 16: "Rule 16(c)(7) refers to *exploring* the use of procedures other than litigation to resolve the dispute. This includes *urging* the litigants to employ adjudicatory

judge, because . . . it is the specific repository of the authority of a federal trial judge to manage the judicial calendar." Charles A. Richey, *Rule 16 Revisited: Reflection for the Benefit of Bench and Bar*, 139 F.R.D. 525, 526 (1991) [hereinafter Richey, *Rule 16 Revisited*]. According to Judge Richey, Rule 16 commands that a judge assert control over litigation from the outset and take an active role in ensuring an action maintains its momentum. *See id.* at 529; *see also* Charles A. Richey, *Rule 16: A Survey and Some Considerations for the Bench and Bar*, 126 F.R.D. 599 (1989) [hereinafter Richey, *Rule 16: A Survey*] (discussing related issues on this topic).

¹⁶ *See In re NLO, Inc.*, 5 F.3d 154, 157 (6th Cir. 1993); *Strandell v. Jackson County*, 838 F.2d 884, 887 (7th Cir. 1988).

¹⁷ *See In re Southern Ohio Correctional Facility*, 166 F.R.D. 391, 395 (S.D. Ohio 1996); *State of Ohio v. Louis Trauth Dairy, Inc.*, 164 F.R.D. 469, 470 (S.D. Ohio 1996); *Federal Reserve Bank of Minneapolis v. Carey-Canada, Inc.*, 123 F.R.D. 603, 604-607 (D. Minn. 1988); *McKay v. Ashland Oil, Inc.*, 120 F.R.D. 43, 46 (E.D. Ky. 1988); *Arabian Amer. Oil Co. v. Scarfone*, 119 F.R.D. 448, 448 (M.D. Fla. 1988).

¹⁸ *See infra* notes 25-26 and accompanying text.

¹⁹ *See Strandell*, 838 F.2d at 887.

²⁰ *See id.*

²¹ *See In re NLO*, 5 F.3d at 157.

techniques outside the courthouse.”²² The court determined that these comments reflect the Advisory Board’s intention that alternative adjudicatory techniques be voluntarily entered into rather than compelled by the courts.²³

Several trial courts have disagreed with the holdings of these courts of appeals.²⁴ Most notably, two decisions out of the Southern District of Ohio have held that the Sixth Circuit’s decision in *In re NLO* was overruled by the December 1993 amendments to Rule 16. In *State of Ohio v. Louis Trauth Dairy, Inc.*,²⁵ the court held that Rule 16(c)(9), which was added after *In re NLO* was decided, considered in conjunction with a local rule authorizing SJTs, permits trial courts to mandate participation in such ADR proceedings.²⁶ Three months later, Judge Spiegel confirmed this holding in a second decision involving an identical issue.²⁷

²² *Id.* at 157.

²³ The Sixth Circuit also considered other sources of statutory authority for mandating participation in SJTs. The court noted that The Civil Justice Reform Act authorizes district courts to require participation in several techniques designed to reduce cost and delay; however, summary jury trials are not mentioned. *See* 28 U.S.C. § 473(b) (1990). This becomes especially significant in light of the Act’s specific authorization of summary jury trials in “appropriate cases” in the previous section. 28 U.S.C. § 473(a)(6) (1990). Comparing these two sections, the court held that Congress did not intend to authorize courts to impose SJTs on unwilling litigants. *See In re NLO*, 5 F.3d at 158 n.1. Apparently “appropriate cases” are those in which the parties consent to the SJT.

²⁴ *See* cases cited *supra* note 17.

²⁵ 164 F.R.D. 469 (S.D. Ohio 1996).

²⁶ *See id.* at 470. After the December 1, 1993 amendment, Rule 16 now reads: “(c) Subjects for Consideration at Pretrial Conferences. At any conference under this rule consideration may be given, and the court may take appropriate action, with respect to . . . (9) settlement and the use of special procedures to assist in resolving the dispute when authorized by statute or local rule.” FED. R. CIV. P. 16(c)(9). The Advisory Committee’s note states in pertinent part: “Even if a case cannot immediately be settled, the judge and attorneys can explore possible use of alternative procedures such as . . . summary jury trials . . . that can lead to consensual resolution of the dispute without a full trial on the merits.” FED. R. CIV. P. 16(c) advisory committee’s note.

Even after the amendment to Rule 16, however, a dispute remains as to whether courts have the authority to mandate participation in SJTs. Ann E. Woodley, for example, commented:

Although this provision appears to authorize mandated participation in SJTs, that authorization is clearly limited to situations in which a statute or local court rule exists on the subject [T]he only federal statute concerning SJTs — Section

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Similarly the U.S. District Court for the Middle District of Florida, in *Arabian American Oil Co. v. Scarfone*,²⁸ explicitly rejected the Seventh Circuit's decision in *Strandell*. The district court judge cited several portions of Rule 16 as supporting the use of SJTs. Judge Kovachevich held: "Rule 16 calls these procedures conferences, but what is in a name. The obvious purpose and aim of Rule 16 is to allow courts the discretion and processes necessary for intelligent and effective case management and disposition."²⁹ The court found the summary jury trial to be a legitimate ADR device providing litigants with an expeditious and just case resolution.³⁰

Thus, although Rule 16 obviously grants some authority to mandate participation in ADR procedures, courts that have considered the issue have been unable to reach a consensus as to how far this authority extends.

Many states have responded to the increasing need for ADR by enacting statutes authorizing courts to require participation in ADR. These statutes have taken various forms. Unlike Rule 16, a number of these statutes authorize judges to mandate participation in specific types of disputes. Litigants in various states are required to attend mediation conferences in breach of warranty suits,³¹ child adoption disputes,³²

473(a)(6) of The Civil Justice Reform Act -- does not provide clear or permanent authority for mandated participation in them. In addition, if the Act does not authorize mandated participation in SJTs and there is no judicial or scholarly agreement about any other source of such authority, there is a question as to the existence of any underlying authority for a local rules [sic] on the subject.

Ann E. Woodley, *Saving the Summary Jury Trial: A Proposal to Halt the Flow of Litigation and End the Uncertainties*, 1995 J. DISP. RESOL. 213, 259. Thus, the status of a court's authority to mandate participation in a SJT remains uncertain.

²⁷ See *In re Southern Ohio Correctional Facility* 166 F.R.D. 391, 395 (S.D. Ohio 1996). Judge Spiegel presided over both of the Ohio cases.

²⁸ 119 F.R.D. 448, 449 (M.D. Fla. 1988).

²⁹ *Id.* at 448. Commenting on the objection to the SJT, the court stated: "Defendants . . . raise objections on the eve of the . . . summary [jury] trial; this constitutes a two-day investment on a real trial projected by the parties to consume 210 courtroom hours, or, seven courtroom weeks. Litigants are entitled to their day in court, but not, to somebody else's day." *Id.* at 449.

³⁰ See *id.*

³¹ See, e.g., ALASKA STAT. § 45.45.355 (Michie 1996).

³² See, e.g., 1993 Or. Laws 401.

medical malpractice claims³³ and many others.³⁴ While case-specific statutes such as these are quite prevalent, most states have authorized courts to require participation in ADR procedures by local court rule or order.³⁵

B. *Inherent Authority*

While some courts have cited Rule 16 as granting substantial authority to mandate participation in ADR, other courts have recognized distinct limits on its authorizing power. The Eleventh Circuit, for instance, held that Rule 16 does not authorize district courts to issue orders commanding represented parties or nonparty insurers to participate in ADR.³⁶ Thus, some other source of authority is necessary to mandate participation by these individuals. Many courts have found this authority in their "inherent power" to manage their dockets.³⁷

The U.S. Supreme Court recognized a court's inherent power as "[t]he control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases."³⁸ Courts must

³³ See, e.g., ME. REV. STAT. ANN. tit. 24, §§ 2851-2859 (West 1990); WIS. STAT. ANN. § 655.43 (West 1995).

³⁴ "Mediation is most frequently mandated for those disputes—such as family and . . . farm mortgage cases—which courts despair of handling well and whose continuation is commonly thought to affect those not at the bargaining table." NANCY H. ROGERS & CRAIG A. MCEWEN, *MEDIATION: LAW, POLICY & PRACTICE* § 7:04 (2d ed. 1994). As of 1995, 33 states had passed statutes calling for mandatory referral of certain disputes to alternative dispute resolution. See CONFLICT RESOLUTION INSTITUTE FOR COURT, NATIONAL INSTITUTE FOR DISPUTE RESOLUTION Matrix #1 (1995) (on file with author).

³⁵ For an excellent discussion of mandatory mediation statutes, see ROGERS & MCEWEN, *supra* note 34, § 7:02 (citing several statutes generally authorizing courts to mandate participation in mediation, including ALASKA STAT. § 25.24.060 (Michie 1996); ARIZ. REV. STAT. ANN. § 25-381.23 (West 1991); MINN. STAT. ANN. § 518.619 (West 1990)).

³⁶ See *In re Novak*, 932 F.2d 1397, 1406 (11th Cir. 1991).

³⁷ For a complete treatment of a court's inherent authority to mandate participation in ADR, see generally David A. Rammelt, Note, "*Inherent Power*" and Rule 16: *How Far Can a Federal Court Push the Litigant Toward Settlement?*, 65 IND. L.J. 965 (1990).

³⁸ *Link v. Wabash R.R. Co.*, 370 U.S. 626, 630-631 (1962). As the Supreme Court recognized in 1812, "[c]ertain implied powers must necessarily result to our Courts of justice, from the nature of their institution . . . [B]ecause they are necessary

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have the authority and flexibility to deal with the challenges thrown on their doorsteps everyday. In a sense, this power exists because it must. This authority “forms the basis for continued development of procedural techniques designed to make the operation of the court more efficient, to preserve the integrity of the judicial process, and to control courts’ dockets.”³⁹

Courts have exercised this inherent authority in a variety of ways. The Eleventh Circuit Court of Appeals, for example, held in *In re Novak*⁴⁰ that a court’s inherent authority authorizes it to require the presence of a represented litigant at a pretrial settlement conference. In reaching this conclusion, the court emphasized that such power must be “grounded first and foremost upon necessity.”⁴¹ A court may invoke its inherent authority only when necessary to protect its ability to function, which necessarily includes its ability to exercise its other powers. The Eleventh Circuit held that to ensure the goals of Rule 16 are not frustrated, the authority to order unrepresented parties to the bargaining table must be recognized.⁴² At the same time, however, the Eleventh Circuit held a district court may not order the employee of a nonparty insurer with full settlement authority to appear at settlement negotiations.⁴³ The appearance of such a party is not necessary to successful negotiations. Because the appearance of such representative was not “necessary” to continued progress towards settlement, the district court could not order the representative’s attendance.⁴⁴

The full extent of a court’s inherent authority to order parties to participate in ADR proceedings is unclear. However, in most cases this inherent authority, in addition to the authority granted by Rule 16 or local statutes, will be sufficient to order parties to participate in some form of ADR. This will become even more true as statutes and local rules are enacted to encourage pretrial settlement.

to the exercise of all others.” *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812).

³⁹ *G. Heileman Brewing Co. v. Joseph Oat Corp.*, 871 F.2d 648, 651 (7th Cir. 1989).

⁴⁰ 932 F.2d 1397, 1407 (11th Cir. 1991).

⁴¹ *Id.* at 1406 (quoting *United States v. Providence Journal Co.*, 485 U.S. 693, 701 (1988)).

⁴² *See id.* at 1401.

⁴³ *See id.* at 1407–1408.

⁴⁴ *See id.* at 1408.

III. REQUIRED LEVEL OF PARTICIPATION

A second issue arises once it is established that a court has the statutory and inherent authority to mandate participation in some form of ADR: what level of participation is required of the litigants? Courts have increasingly ordered parties to participate in good faith in settlement discussions.⁴⁵ Whether this is good policy and what it entails are subjects of considerable debate.

The good faith participation requirement for ADR is premised on the belief that since ADR is usually nonbinding, it would be a futile exercise if a litigant is unwilling to participate with an open mind. The Eleventh Circuit Court of Appeals, in *In re Novak*, discussed several benefits of settlement conferences.⁴⁶ First, they provide neutral forums to foster settlement, which in turn, "eases crowded court dockets and results in savings to the litigants and the judicial system."⁴⁷ During the conference, counsel for both parties are given a chance to argue their side to the court. In this discussion, counsel and represented clients, if present, often learn for the first time the difficulties they may face at trial. As a result, they may be willing to relax previously held positions.

Second, settlement conferences allow courts to manage their dockets efficiently.⁴⁸ At these conferences, courts receive important information from the parties concerning the development of the case. Relying on this information, courts plan ahead by scheduling trials, hearings and other necessary matters.⁴⁹ The value of this efficient management of court calendars should not be underestimated. If the court is able to adjudicate cases without excessive delay, "it reduces the costs to the taxpayers and the expenses incurred by jurors, witnesses, parties, and lawyers."⁵⁰

The success of pretrial settlement conferences depends in large part upon the preparedness of the participants. If the participants are unprepared, these procedures become "cathartic exercises," in which parties share general feelings about the case, but fail to offer any sharp

⁴⁵ See, e.g., *Halaby, McCrea & Cross v. Hoffman*, 831 P.2d 902, 907-908 (Colo. 1992); *Decker v. Lindsay*, 824 S.W.2d 247, 251-252 (Tex. App. 1992, no writ).

⁴⁶ See *In re Novak*, 932 F.2d at 1404-1405.

⁴⁷ *Id.* at 1404 (quoting FED. R. CIV. P. 16 advisory committee's note).

⁴⁸ See *id.*

⁴⁹ See *id.*

⁵⁰ *Id.*

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analysis of the issues.⁵¹ When participants are well-prepared, however, settlement conferences can be extremely productive. "Prepared litigants are able to discuss the merits of the case cogently and negotiate settlement terms intelligently; furthermore, courts can rely upon these litigants' representations to manage their dockets."⁵² Further, "at a time when the federal courts . . . are straining under the pressure of [overwhelming] caseloads, we simply cannot permit litigants to waste the courts' assets, not to mention those of their adversaries"⁵³ In this time of backlogged dockets, something may have to give—party autonomy or quicker settlements. Many judges are opting for quicker settlements.

In *Wahle v. Medical Center of Delaware, Inc.*⁵⁴ the Supreme Court of Delaware upheld the dismissal of plaintiff's suit for failure to participate in good faith in court-annexed arbitration. Plaintiff repeatedly frustrated the trial court's order to participate in ADR proceedings, causing arbitration to be drawn out over a seven and one-half month period.⁵⁵ Citing plaintiff's repeated failure to obey court orders, the court stated: "[T]he substantial benefits offered by arbitration can only be realized if litigants diligently pursue the process and comply with its rules of procedure. In this case, plaintiff clearly did not."⁵⁶ Blatant disregard for court authority represents an obvious violation of an order to participate in good faith.

In *St. Paul Fire & Marine Insurance Co. v. CEI Florida, Inc.*⁵⁷ the U.S. District Court for the Eastern District of Michigan imposed a monetary sanction for plaintiff's lack of good faith attempt to comply with a local court rule and pretrial order. The court order made it very clear that a client with authority to settle the case must be present at the settlement

⁵¹ *See id.*

⁵² *Id.*

⁵³ *Id.* (quoting *Pelletier v. Zweifel*, 921 F.2d 1465, 1522 (11th Cir. 1991)).

⁵⁴ 559 A.2d 1228 (Del. 1989).

⁵⁵ *See id.* at 1233.

⁵⁶ *Id.* The Delaware Supreme Court noted that the trial court accurately analogized plaintiff's conduct in arbitration to a contestant who "threw in the towel" and properly concluded by stating: "It would make a mockery out of the arbitration process if everyone just said, 'Forget it. I am going to concede. Enter judgment against me so I can take an appeal de novo.' This trenchant comment is one that future litigants should not disregard." *Id.* at n.4.

⁵⁷ 152 F.R.D. 95 (E.D. Mich. 1993).

conference.⁵⁸ However, plaintiff failed to produce such a representative. The representative who was present possessed only illusory authority to settle, causing the court to comment: "the Court is absolutely persuaded that St. Paul and its counsel did not make a good faith effort to abide by the . . . pretrial order and the policies . . . that underlay it."⁵⁹ In response, the court limited any award St. Paul might receive to fifty percent of any judgment rendered in its favor.⁶⁰

Sometimes courts go too far in attempting to force parties into settlement. In *State v. Carter*,⁶¹ the Court of Appeals of Indiana held that the trial court had abused its discretion in sanctioning the State for bad faith participation in mediation. The court found no evidence supporting the trial court's finding of bad faith.⁶² The lower court had apparently based its decision on the fact that the State showed a limited willingness to resolve the dispute at mediation.⁶³ The court of appeals noted, however, that the State had no duty to settle the lawsuit. Under Indiana law, "[p]arties and their representatives are required to mediate in good faith, but are not compelled to reach an agreement."⁶⁴ The mere fact that the State's proffered settlement amount was rejected by the party does not authorize the trial court to impose sanctions. Reasonable disagreement over the merits of a case may not prompt an award of sanctions against either party.⁶⁵

⁵⁸ See *id.* at 97. The court order stated in bold, capital and underlined letters, "**TRIAL COUNSEL MUST BE PRESENT. CLIENTS, OR THOSE WITH AUTHORITY TO ENGAGE IN SETTLEMENT NEGOTIATIONS, SHALL ALSO BE PRESENT. THERE WILL BE NO EXCEPTIONS TO THIS REQUIREMENT . . .**." *Id.* This case is discussed further *infra* notes 120-123 and accompanying text.

⁵⁹ *Id.* at 99.

⁶⁰ See *id.* at 100.

⁶¹ 658 N.E.2d 618, 621-623 (Ind. Ct. App. 1995).

⁶² See *id.* at 622-623.

⁶³ See *id.* at 623.

⁶⁴ *Id.*

⁶⁵ The court noted that settlement is not the only goal of mediation. "[A]greement' is another goal, whether it be factual stipulation, an agreement to forego a jury trial in favor of binding arbitration, an identification of issues, . . . a clarification of priorities, or a location of points of agreement." *Id.* at 623. Hence, even where chances of settlement are slight, mediation can still be beneficial. "If sanctions are imposed in

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In *Kothe v. Smith*⁶⁶ the Second Circuit similarly reversed a trial court's sanction of a party for failure to act in good faith in the settlement process. In *Kothe*, the parties had been unable to resolve their dispute prior to trial, with the plaintiff demanding \$50,000 in response to defendant's offer of \$5000. Plaintiff's attorney indicated to the trial judge his client would be willing to settle for \$20,000. After one day of trial, the parties settled for exactly that amount. The trial judge ordered defendant to pay \$2480 for attorney's fees and other costs for unreasonable delay in settling the case.⁶⁷ The Second Circuit reversed, noting that both parties are responsible for negotiating a settlement: "Offers to settle are not made in a vacuum [T]he process of settlement is a two-way street, and a defendant should not be expected to bid against himself."⁶⁸ Defendant had received no indication that plaintiff would be willing to settle for approximately \$20,000. Defendant could not be expected to make an offer of this amount simply because the court wanted him to do so.⁶⁹

In response to perceived abuse by judges intent on bringing about a settlement, many commentators have decried the good faith standard. Professor Edward F. Sherman of the University of Texas School of Law, for example, believes it is improper to attempt to require good faith participation. ADR participants, he argues, are not obligated to find a basis for agreement, display a sincere desire to compromise or counter meaningfully an opponent's offers.⁷⁰ ADR merely offers a process of assisted negotiation in which parties may, but are not required, to seek a compromise. Courts should not deny parties the right to take strong, or even extreme positions—for example, that no compromise is possible or that the party is unwilling to budge from her initial demand. To do so

situations where no settlement is agreed upon, parties may refuse to participate in mediation." *Id.*

⁶⁶ 771 F.2d 667 (2d Cir. 1985).

⁶⁷ *See id.* at 669.

⁶⁸ *Id.* at 671. In discussing this case, one commentator noted that perhaps both parties should be sanctioned in cases in which the parties settle soon after trial begins, thereby (from the author's perspective) wasting valuable court time. *See* David L. Shapiro, *Federal Rule 16: A Look at the Theory and Practice of Rulemaking*, 137 U. PA. L. REV. 1969, 1990 (1989).

⁶⁹ *See Kothe*, 771 F.2d at 670.

⁷⁰ *See* Edward F. Sherman, *Court-Mandated Alternative Dispute Resolution: What Form of Participation Should be Required?*, 46 SMU L. REV. 2079, 2093 (1993).

“would deprive [parties] of litigant autonomy and the legitimate right to hold out and have those issues determined in a trial.”⁷¹

When parties are intent on taking their cases to trial, judges must avoid attempting to strong-arm them into settlement. Such tactics are not only clearly contrary to the intentions of the drafters of Rule 16,⁷² but will serve to erode the litigants’ confidence in ADR.

The question remains as to what exactly good faith participation entails. Professor Sherman argues that it depends upon the nature of the ADR proceeding. He draws a distinction between what he calls “facilitative ADR” and “evaluative” or “trial run” forms of ADR. “Facilitative ADR,” such as mediation, involves the least amount of structure and requires the least amount of formal participation.⁷³ Parties should be encouraged, but not required, to actively engage in settlement negotiations.⁷⁴ In “evaluative” or “trial run” ADR, however, much more is expected of the parties.⁷⁵ Each side presents its case to a neutral third party or parties for formal evaluation. To be successful, these forms of ADR require a fairly comprehensive discussion of the disputed law and facts. If parties fail to provide some minimal level of participation, they waste the opponent’s time and money. Courts are undoubtedly justified in sanctioning such behavior.

The precise boundaries of good faith participation will have to be determined by caselaw as such orders by the courts become more prevalent. Attorneys can protect themselves, however, by adhering to the holding of the Colorado Supreme Court in *Halaby, McCrea & Cross v. Hoffman*.⁷⁶ In *Halaby*, the court held as an abuse of discretion a trial court’s sanction of petitioner for failure to participate in good faith at a settlement conference.⁷⁷ The supreme court’s holding was based on several factors. First, the petitioner complied with all procedural orders issued by the court. Petitioner submitted a confidential settlement statement outlining its current settlement position, placing respondent on notice that petitioner

⁷¹ *Id.*

⁷² “[I]t is not the purpose of Rule 16(b)(7) to impose settlement negotiations on unwilling litigants” FED. R. CIV. P. 16(c) advisory committee’s note.

⁷³ See Sherman, *supra* note 70, at 2096.

⁷⁴ See *id.*

⁷⁵ See *id.* at 2098.

⁷⁶ 831 P.2d 902 (Colo. 1992).

⁷⁷ See *id.* at 908.

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was unwilling to settle. Second, petitioner's representative did not lack settlement authority, as ruled by the trial court. Rather, the court found, it was simply inadequate in the eyes of the respondent.⁷⁸ The lesson to be learned from this case is that parties should follow the instructions issued by the court in its order to participate in ADR. As in *Halaby*, this might include position papers discussing the party's stance on the legal and factual issues involved and the relief sought, as well as an order to produce a party with full settlement authority.⁷⁹ In response, judges must take care not to abuse their authority to mandate participation in ADR, protecting party autonomy as much as possible.⁸⁰

⁷⁸ *See id.*

⁷⁹ Professor Sherman suggests that a reasonable court order would be that the parties provide position papers prior to the settlement conference indicating the following: (1) the legal and factual issues in dispute; (2) the party's position on those issues; (3) the relief sought as well as an itemization of all elements of damage claimed; and (4) any offers and counter-offers previously made. In addition, the court might require the parties to provide to the other side certain documents, such as medical reports or business records, if not already disclosed through discovery. *See Sherman, supra* note 70, at 2095. Disclosure of such information paves the way for meaningful consideration of the issues involved.

⁸⁰ Litigants considering disobeying a court order they believe beyond the scope of the court's authority should take heed of the Eleventh Circuit decision in *In re Novak*, discussed *supra* notes 40–44 and accompanying text. There, the court concluded that the district court had exceeded its authority in ordering an employee of the defendants' insurer to attend a pretrial conference. *See In re Novak*, 932 F.2d at 1397. The court also held, however, that the order "was neither transparently invalid nor patently frivolous." *Id.* Faced with an order of arguable validity, the law required Novak to comply with the order despite the fact that it was later struck down. Novak's conviction for criminal contempt was upheld. *See id.* at 1409.

Loss of party autonomy is one concern often voiced with respect to compelled ADR proceedings. Parties have often refused to submit to ADR proceedings for fear of revealing the contents of confidential documents prior to trial. *See, e.g., Strandell v. Jackson County, Ill.*, 838 F.2d 884, 886 (7th Cir. 1987). Judge Richey, however, dismissed such objections: "I am not particularly concerned with potential intrusions into the protections of the work-product doctrine The disclosure of information at [an ADR proceeding] in no way prejudices a participant, as the information would ultimately be disclosed at trial anyway." Richey, *Rule 16: A Survey, supra* note 15, at 609.

IV. APPROPRIATE SANCTIONS

So, most courts are willing to order parties to participate in ADR and require them to participate in good faith, even if the term is somewhat ambiguous. Such authority is worth very little without the authority to issue sanctions for disobeying a court order. The appropriate sanction, however, can often be difficult to determine.

In contexts outside of ADR proceedings, it is often quite easy to determine the proper penalty for disobeying a court order. The court simply imposes the penalty that fits the "crime." For example, when a party violates a scheduling order by failing to disclose a list of expert witnesses prior to trial, the court may exclude the testimony of these witnesses.⁸¹ Similarly, where a plaintiff fails to preserve evidence for defendant's examination, exclusion of such evidence from trial is clearly warranted.⁸² Determining the appropriate penalty for the "crime" of failing to participate in court-mandated ADR, however, is not as easy. A monetary sanction may be appropriate in some instances. Other situations, however, may call for a different, more creative sanction. The question is, how far may a judge go in punishing the offender? Some guidelines are needed to ensure fair, uniform penalties in ADR contexts.

A. *Determine Who is at Fault*

The first rule is to punish the individual at fault. While this may seem obvious, courts occasionally forget that although attorney and client are on the same team, neither is in complete control of the other. In some instances, it will simply be unfair to sanction one person for the negligent or irrational behavior of another.

For example, in some cases, a client refuses to follow the advice of counsel. When this behavior interferes with the proper operation of a

⁸¹ See *Hill v. Porter Mem'l. Hosp.*, 90 F.3d 220, 224 (7th Cir. 1996) (upholding trial court's exclusion of expert witnesses where plaintiff did not disclose an expert's name until 74 days after the deadline or the expert's report until 139 days after the deadline).

⁸² See *K. Sylla-Sawdon v. Uniroyal Goodrich Tire Co.*, 47 F.3d 277, 281 (8th Cir. 1995). "The power of the trial court to exclude exhibits and witnesses not disclosed in compliance with its discovery and pretrial orders is essential to judicial management of the case." *Id.* (quoting *Admiral Theatre Corp. v. Douglas Theater Co.*, 585 F.2d 877, 897-898 (8th Cir. 1978)).

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settlement conference, whose fault is it? The Eighth Circuit Court of Appeals recently faced this issue in *Universal Cooperatives, Inc. v. Tribal Co-Operative Marketing Development Federation of India, Ltd.*⁸³ *Universal Cooperatives* involved a breach of contract claim between Universal Cooperatives and Tribal Co-Operative Marketing Development Federation of India [Trifed]. Defendant Trifed was headquartered in India and had no offices or employees located within the United States.⁸⁴ Trifed was represented by one Klayman, an attorney practicing in Washington, D.C.⁸⁵

Prior to trial, the magistrate judge ordered the parties and their counsel to appear at a settlement conference. In addition to the attorneys, the court ordered that a representative of each party with "full settlement authority" be present.⁸⁶ Reflecting his belief that settlement was impossible, Trifed's attorney requested that the magistrate waive the requirement that a corporate officer attend the conference.⁸⁷ The magistrate refused to alter his order.

As the Eighth Circuit opinion reflects, Klayman made every effort to convince a representative of Trifed to appear for the settlement conference. The uncontradicted affidavit of Trifed's manager stated that Klayman "at all times advised that the magistrate's order must be obeyed and that a TRIFED official from India must appear at the conference, with full authority to settle the case."⁸⁸ Despite Klayman's efforts, Trifed remained inflexible, refusing to send a corporate representative. Instead, Trifed sent a "deputized" official already present in the United States.⁸⁹ When it became obvious that this representative knew nothing about the case and had no authority to settle, Magistrate Noel fined Trifed \$6708, which represented the sum of money Trifed thought it would save in air fare by

⁸³ 45 F.3d 1194 (8th Cir. 1995).

⁸⁴ See *id.* at 1195.

⁸⁵ See *id.*

⁸⁶ *Id.* at 1196. The court order explained: "[Full settlement authority] means that each party must attend through a person who has the power to change that party's settlement posture during the course of the conference. If the party representative has a limit, or 'cap' on his or her authority, this requirement is not satisfied." *Id.*

⁸⁷ Klayman's request to the magistrate stated: "TRIFED is not willing to pay to plaintiff anything whatsoever in settlement of this suit, as TRIFED feels very strongly that plaintiff's claim is frivolous and groundless." *Id.*

⁸⁸ *Id.* at 1197. The affidavit also indicated that Klayman suggested that Trifed make at least a nominal settlement offer. Trifed failed to heed this advice. See *id.*

⁸⁹ See *id.* at 1196.

refusing to send a corporate officer to the settlement conference. Furthermore, the magistrate ordered Klayman to pay Universal all costs incurred by the plaintiff in attending the aborted settlement conference, including attorney's fees.⁹⁰

On appeal, the Eighth Circuit agreed that sanctions were appropriate for Trifed's refusal to comply with the court order.⁹¹ The court noted that Trifed had several opportunities to convince the trial judge to alter his pretrial order. When the judge refused, Trifed simply chose not to comply.⁹² The sanctions against Klayman, however, were inappropriate.⁹³ As discussed above, Klayman made every effort to convince his client to comply with the court's order. The client, however, ignored the advice of its attorney. In such a case, there is no reason to sanction the attorney.

Similarly, courts must be careful not to punish a represented party when it is the attorney who is at fault. The Tenth Circuit Court of Appeals had an opportunity to address this issue in *In re Sanction of Baker*.⁹⁴ Just before trial, the defendant in this three-party action sought a continuance based on a failure to depose a critical witness. The motion was heard on the day scheduled for trial. At this hearing, counsel for plaintiff admitted that, while he was prepared to proceed to trial, he shared in the responsibility for the third-party defendant's inability to take the deposition of his witness. The two attorneys had attempted to agree on a time at which to take the deposition, but this effort had failed. In response, the trial court granted the continuance, but imposed a \$175. sanction on each attorney for lack of preparation and wasting the court's time.⁹⁵ Both attorneys appealed.

The Tenth Circuit examined the sanction in light of the court's inherent authority to manage its docket⁹⁶ as well as the authority granted by Federal Rule of Civil Procedure 16.⁹⁷ According to the court of appeals, the trial court had several options. First, it could have granted the continuance and fined the attorneys responsible for the delay.⁹⁸ Or, the trial court could

⁹⁰ See *id.*

⁹¹ See *id.*

⁹² See *id.* at 1197.

⁹³ See *id.*

⁹⁴ 744 F.2d 1438 (10th Cir. 1984).

⁹⁵ See *id.* at 1439-1441.

⁹⁶ See *supra* Part II.B.

⁹⁷ See *supra* Part II.A.

⁹⁸ See *In re Sanction of Baker*, 744 F.2d 1438, 1441 (10th Cir. 1984).

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have simply denied the continuance and thus the inconvenience imposed on the court, requiring the third-party defendant to present his case without the benefit of deposition.⁹⁹ As the Tenth Circuit noted, however, “this would turn the purpose of sanctions on their [sic] head.”¹⁰⁰ To have forced the third-party defendant to go to trial without that witness would have injured the defendant’s chances of success. However, the client was not at fault.¹⁰¹ Where the interference with sound management lies with counsel, the attorney, rather than the client, should suffer the ramifications.

B. *Monetary Sanctions*

Imposing sanctions for failure to participate in court-mandated ADR can be a tricky business. Quite often, it will appear as though monetary sanctions are warranted.¹⁰² However, the appropriate penalty may be difficult to determine. A court must ensure that the sanction imposed is consistent with the rationale behind the penalty.

Sanctions imposed for failure to participate in ADR serve two functions. The primary purpose of such sanctions is “to insure reasonable management requirements for case preparation.”¹⁰³ Thus sanctions may be necessary “not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent.”¹⁰⁴ This type of “punitive” sanction was imposed in *Universal Cooperatives*, in which the defendant refused to send a corporate representative from its headquarters in India to a settlement conference taking place in the United States.¹⁰⁵ As noted above, the Eighth Circuit determined that the appropriate penalty was not

⁹⁹ See *id.* at 1441–1442.

¹⁰⁰ *Id.* at 1441.

¹⁰¹ Certainly there are times when a party will be held responsible for the negligent acts of her counsel. Such sanctions should be avoided, however, when they will be of little help in changing the behavior of the offending party. In this case, it was the attorney that was rightfully sanctioned.

¹⁰² The difficult decision of when to impose non-monetary sanctions is discussed *infra* Part IV.C.

¹⁰³ *In re Sanction of Baker*, 744 F.2d 1438, 1441 (10th Cir. 1984).

¹⁰⁴ *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 643 (1976).

¹⁰⁵ See *Universal Cooperatives, Inc. v. Tribal Co-Operative Marketing Development Federation of India, Ltd.*, 45 F.3d 1194, 1196 (8th Cir. 1995).

the expenses incurred by the plaintiff in attending the conference, but rather the amount defendant had attempted to save by not sending a representative.¹⁰⁶ By imposing this sanction, the court intended to remove any incentive in future cases for violating a court order.¹⁰⁷ Litigants will be forced to take into account the possibility of such a sanction in a cost-benefit analysis of attending settlement conferences.

In addition to punitive sanctions, penalties for failure to participate in ADR serve "[t]he secondary purpose of compensating parties for the inconvenience and expense incurred because of noncompliance with the reasonable management orders of the court."¹⁰⁸ In *Dvorak v. Shibata*,¹⁰⁹ for example, plaintiff drove from Illinois to Nebraska to participate in a settlement conference. Upon commencement of the conference, however, it soon became apparent that defendant's representative had no authority to negotiate, in contravention of the court's settlement conference order. As a result, plaintiff was awarded the expenses incurred in traveling to the conference, including mileage, lodging, lost wages and other out-of-pocket costs, as well as his attorney's fees incurred at the conference.¹¹⁰ By taking into account both the punitive and compensatory elements of sanctions for violating ADR orders, courts can both protect the complying party and help ensure participation by future litigants.

C. Dismissal?

One of the most difficult issues with regard to court-mandated ADR is when, if ever, does a party's failure to participate in good faith permit a judge to enter judgment against the disobedient party? Whether relying on the court's inherent power to manage its docket or an authorizing statute such as Rule 16, most judges would agree that at some point, dismissal is appropriate. As Judge Richey has commented, "[a]lthough Rule 16(f) does not by its express terms authorize dismissal, the Rule incorporates the punishments authorized under Rule 37(b)(2)(C) for discovery violations, among which are included the sanctions of dismissal or default

¹⁰⁶ See *id.* at 1196-1197.

¹⁰⁷ See *id.*

¹⁰⁸ *In re Sanction of Baker*, 744 F.2d 1438, 1441 (10th Cir. 1984).

¹⁰⁹ 123 F.R.D. 608, 610 (D. Neb. 1988).

¹¹⁰ See *Dvorak*, 123 F.R.D. at 611.

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judgment.”¹¹¹ Although courts may indeed possess such authority, it should be exercised with great caution.

Given our judicial system's preference for party autonomy and the right to have a dispute decided by a jury, a court should examine carefully the nature of a party's misconduct in considering dismissal. A court should satisfy itself that a litigant's behavior truly warrants such a severe sanction. In making this determination, the court should take several factors into consideration. First, the court should ensure that dismissal will further ADR's goal of efficient case management. Second, the court should determine whether a party has acted in bad faith or whether a party's failure to participate represents a fundamental litigation tactic intended to harm the opposing party. Third, a court should warn the disobedient party that they may be subject to default judgment for failure to follow the court's instructions.

1. *Efficient Case Management*

ADR procedures seek to help the court manage its docket more efficiently. Penalties for failure to participate in ADR must therefore be imposed with the furtherance of this goal in mind. Dismissal should, for the most part, be reserved for those cases in which ADR procedures can save the court a significant amount of time.

In *Decker v. Lindsay*,¹¹² defendants challenged the trial court's order to participate in a mediation conference. Defendants objected on several grounds. First, the lawsuit arose out of a simple rear-end car collision, in which the only issues were negligence, proximate cause and damages. Because defendant was unwilling to settle for any amount and there were no complicated factual or legal issues to be resolved, he felt mediation would simply be a waste of time. Second, defendant asserted the trial would only last two days.¹¹³ If this were true, a day wasted in mediation would represent a substantial increase in the cost to the litigants. Although the court in *Decker* upheld the validity of the order to participate in the mediation conference, the decision was justified in part on the finding that the trial would last longer than the two days defendant claimed.¹¹⁴

¹¹¹ Richey, *Rule 16: A Survey*, *supra* note 15, at 614–615.

¹¹² 824 S.W.2d 247 (Tex. App. 1992, no writ).

¹¹³ *See id.* at 249.

¹¹⁴ *See id.*

However, a court should avoid causing parties to incur substantial expenses in ADR proceedings where the chances of success, whether settlement or a narrowing of issues, are very slim.¹¹⁵ In such a case, the goal of efficient case management is unlikely to be realized, making dismissal a less appropriate sanction.

Decker involved a case with a relatively simple legal dispute whose resolution would take only a limited amount of time. However, other cases involve complex factual and legal theories that may take weeks and even months to resolve. These are the disputes that will benefit most from pretrial ADR proceedings. If the litigants can narrow the number of issues in dispute prior to trial, significant amounts of time can be saved. In some instances, the litigants will, in their own self-interest, cooperate with the court's pretrial ADR orders. When this is not the case, however, the threat of dismissal can force the parties to the bargaining table, maximizing the opportunities for quicker resolution of the conflict.

In *G. Heileman Brewing Co. v. Joseph Oat Corp.*,¹¹⁶ for instance, the defendant corporation refused to comply with the court's order mandating participation in a pretrial settlement conference. The case involved a claim for \$4 million and turned upon the resolution of complex factual and legal issues.¹¹⁷ Furthermore, the trial was expected to last from one to three months, consuming valuable court resources and causing the parties to incur substantial legal fees and trial expenses.¹¹⁸ Nonetheless, defendant refused to comply with the court's order to send a "corporate representative with authority to settle" to a pretrial conference.¹¹⁹ The representative that did attend simply repeated defendant's statement that it was unwilling to settle. In doing so, defendant not only willfully ignored a

¹¹⁵ Courts should hesitate to order parties to participate in ADR where the chances of making any progress are slim. In one case, where the parties' claims were vastly divergent, a federal judge indicated to them that "if, prior to the scheduled settlement conference, it was established that the parties' positions were so far apart that settlement was not likely, the settlement conference could be cancelled so as to avoid needless expense and time being invested in a futile effort." *Dvorak v. Shibata*, 123 F.R.D. 608, 609 (D. Neb. 1988). Judges should use their past experience in previous settlement conferences to make these decisions.

¹¹⁶ 871 F.2d 648 (7th Cir. 1987).

¹¹⁷ See *id.* at 654.

¹¹⁸ See *id.* at 654.

¹¹⁹ *Id.* at 650 (quoting federal magistrate's pretrial conference order).

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court order, but also nullified the potential benefits and opportunities presented by negotiation in complex cases.

In such a case, the court would have been justified in entering judgment against the offending party. When a case is projected to occupy a substantial amount of time, the court has a significant interest in ensuring that the parties adhere to its orders to participate in settlement conferences. Until the parties sit down across from one another, it is impossible to predict what concessions will be made or which issues can be resolved. Litigants who eliminate even the possibility of narrowing the issues or otherwise making progress deserve this ultimate sanction and should not be heard to complain when their actions result in stiff penalties imposed by the court.

*St. Paul Fire & Marine Insurance Co. v. CEI Florida, Inc.*¹²⁰ is a second case involving a litigant who failed to obey a court's order to send someone with bargaining authority to a settlement conference. Plaintiff St. Paul sent a representative with authority to compromise only \$10,000 of the \$1,000,000 claim.¹²¹ In sanctioning the plaintiff, the court commented that even if the court, through consultations with the defendants, had been able "to get \$750,000 or even \$950,000 on the table for St. Paul," plaintiff's representative would have been unable to accept it.¹²² This was, according to the court, unacceptable behavior on the part of the plaintiff.¹²³ As was true in *G. Heileman*, it is this type of case in which settlement negotiations hold the most potential. Courts must be willing to impose the ultimate sanction of dismissal in these cases involving complicated issues that will consume a tremendous amount of court resources, even if they do involve large sums of money.

¹²⁰ 152 F.R.D. 95 (E.D. Mich. 1993).

¹²¹ *See id.* at 99.

¹²² *Id.* at 120. In condemning this type of behavior, the court noted that in light of the fact that several defendants had flown in from various parts of the country, "[p]ermitting such tactics to go unpunished would be particularly unfair to Defendants." *Id.* at 99 n.1. "It is precisely this kind of stonewalling by counsel and parties that Local Rule 16.1 [authorizing the court to demand both counsel and represented clients to attend the settlement conference] and the Court's pretrial order are designed to thwart." *Id.*

¹²³ *See id.*

2. Courts Must Warn Parties that Failure to Follow the ADR Order Could Result in Dismissal

The discussion above is not intended to suggest that courts should hasten to dismiss a case simply because it involves complex issues. Parties to such suits are entitled to notice that they risk suffering an adverse judgment if they fail to participate; dismissal should never come as a surprise. In *St. Paul Fire*, for instance, the court's pretrial order provided in bold, capital and underlined letters that "**FAILURE OF CLIENTS, OR THOSE WITH AUTHORITY TO APPEAR AT THE FINAL PRETRIAL SETTLEMENT CONFERENCE WILL RESULT IN ENTRY OF JUDGMENT.**"¹²⁴ Although the court decided not to dismiss the case, it warned the parties that dismissal was possible. Such a warning impresses upon litigants the serious nature of the court's order and allows litigants to weigh the risks of failing to participate, including losing the case before it ever goes to trial.

3. Courts Should Consider Whether a Party has Acted in Bad Faith in Violating the Court Order

Complex suits that will occupy a great deal of the court's resources are not the only cases that should be dismissed for failure to participate in ADR. Courts should consider the threat of dismissal whenever the disobedient party has acted in bad faith in ADR proceedings. In the context of discovery violations, the Tenth Circuit noted that due to the harshness of dismissal, due process requires that failure to comply with court orders is a sufficient ground for dismissal "only when it is a result of willfulness, bad faith, or [some] fault of petitioners rather than inability to comply."¹²⁵ This is true in the ADR context as well. A finding of bad faith will require willful disregard for court authority. The court should examine the circumstances surrounding the refusal to participate to determine whether it was intentional disrespect for court authority or merely an innocent mistake in deciding whether a severe sanction is warranted.

Bad faith can be proven in several different ways. One example is a party's repeated failure to adhere to court instructions regarding ADR

¹²⁴ *Id.* at 97.

¹²⁵ *M.E.N. Co. v. Control Fluidics, Inc.*, 834 F.2d 869, 872 (10th Cir. 1987) (quoting *Societe Internationale v. Rogers*, 957 U.S. 197, 212 (1958)).

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procedures. While some violations of court orders may be excused as isolated incidents, repeated violations cannot be easily ignored.

In *Silliphant v. City of Beverly Hills*¹²⁶ a California State Court of Appeals determined that plaintiff's failure to appear at an arbitration hearing warranted dismissal of the case. While failure to appear may not have required dismissal in and of itself, plaintiff's repeated refusal to comply with the court's pretrial orders rendered such a sanction appropriate. For instance, even after plaintiff requested and was granted repeated extensions on the deadline for answering interrogatories, he failed to properly respond.¹²⁷ Plaintiff also continually delayed the taking of a deposition of a key witness to the case. When the deposition was finally taken, plaintiff's counsel repeatedly interrupted. He directed demeaning remarks towards defendant's counsel and answered numerous questions posed to the witness.¹²⁸ Finally, after several months of further delays, plaintiff and her counsel failed to appear at an arbitration hearing.¹²⁹

The California Supreme Court stated that "[a]n immediate and unconditional dismissal entered at the first suggestion of noncooperation [i.e., by failing to participate in an arbitration hearing] is too drastic a remedy in light of the fact that arbitration was not intended to supplant traditional trial proceedings, but to expedite the resolution" of civil claims.¹³⁰ However, this case involved much more than the first suggestion of noncooperation. Rather, the failure to appear at the arbitration hearing was the last in a series of events evincing a lack of respect for the court on behalf of plaintiff and her counsel. This type of disrespect for court authority demands dismissal to eliminate such behavior in future litigants.

A party also acts in bad faith when noncompliance represents a fundamental litigation technique intended to advance that party's interest in the lawsuit. The Tenth Circuit addressed this issue in an area related to ADR in *Smith v. United States*.¹³¹ In *Smith*, plaintiff's attorney repeatedly

¹²⁶ 241 Cal. Rptr. 356 (Cal. Ct. App. 1987).

¹²⁷ Defendant in this case initially propounded interrogatories to plaintiff on December 4, 1984. After the first deadline for responses had passed, plaintiff was granted a 30 day continuance. Plaintiff again missed the deadline and was granted a second continuance. On May 20, 1985, plaintiff still had not responded to the interrogatories. *See id.* at 356-357.

¹²⁸ *See id.* at 357.

¹²⁹ *See id.* at 358.

¹³⁰ *Id.* at 359.

¹³¹ 834 F.2d 166 (10th Cir. 1987).

failed to comply with discovery orders.¹³² The court commented that at some point, plaintiff must suffer the consequences for this noncompliance.¹³³ This point is arrived at when "the lawyer (or the client) makes a tactical decision and his noncompliance with the court's directive is not a product of inadvertence."¹³⁴ A similar situation in the context of ADR can easily be imagined. Where repeated failure to follow ADR instructions represents a fundamental litigation tactic intended to drain the opposing party's resources, a court is undoubtedly justified in dismissing the case.

Bad faith can also be proven by a party's blatant disregard of an explicit, unambiguous court order. Courts have in various cases used language such as "Tell [your clients] not to send some flunky who has no authority to negotiate"¹³⁵ and "Roger Novak is hereby ORDERED to appear before the court . . ."¹³⁶ in their directions to parties. Upon receipt of such an order, a party can hardly claim surprise when the court contemplates dismissal for noncompliance. Unless the party can adequately explain the disobedience, dismissal may be appropriate.

4. Case Study of a Dismissal

*Gilling v. Eastern Airlines*¹³⁷ will serve as a case study for appropriate sanctions for failure to act in good faith in ADR proceedings. First, the factors for determining the appropriate sanction will be applied to the actual facts of *Gilling*. Then, several variations on these facts will be considered as well.

In *Gilling* plaintiffs brought suit against Eastern Airlines alleging they were wrongfully ejected from their flight during a stopover. Plaintiffs' complaint stated claims of breach of contract, negligence, false imprisonment, battery, assault, slander, invasion of privacy, infliction of emotional distress and conversion. The case was referred to compulsory

¹³² See *id.* at 168.

¹³³ See *id.* at 171.

¹³⁴ *Id.*

¹³⁵ *Lockhart v. Patel*, 115 F.R.D. 44, 45 (E.D. Ky. 1987) (quoting court's directive to defense counsel regarding attendance at settlement conference).

¹³⁶ *In re Novak*, 932 F.2d 1397, 1399 n.2 (11th Cir. 1991).

¹³⁷ 680 F. Supp. 169 (D.N.J. 1988).

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arbitration under a local rule.¹³⁸ The local rule authorized courts to “impose appropriate sanction, including, but not limited to, the striking of any demand for a trial de novo” on behalf of any party who failed to participate “in a meaningful manner” in the arbitration.¹³⁹ In this situation, striking the non-participating party’s motion for a trial de novo would be equivalent to having judgment entered against that party, who would be stuck with the decision made at the arbitration in which the party did not participate. It does not appear as though the court’s order in *Gilling* which directed the parties to participate in the arbitration contained any warning that failure to do so could result in binding judgment against them. Instead, the court relied on the local rule quoted above to warn the parties of the possible penalties involved.

The court in *Gilling* first upheld the arbitrator’s decision that the defendant had failed to participate in a meaningful manner.¹⁴⁰ Defendant’s attorney had taken virtually no depositions, had merely read fact summaries on behalf of her client and had failed to produce any witnesses.¹⁴¹ While none of these actions were required, the arbitrator was certainly entitled to consider them in deciding whether defendant had participated “in a meaningful manner.”¹⁴² In imposing a sanction, the court ordered the defendant to reimburse the passengers for all costs and fees incurred preparing for and participating in arbitration, as well as costs and fees incurred in defending against defendant’s motion for a trial de novo.¹⁴³ However, the court did allow the defendants to pursue a new trial.

Applying the factors for determining whether dismissal is appropriate, the district court’s decision complies with the general goals and policies behind imposing sanctions in ADR proceedings. First, the goal of efficient case management would not have been significantly advanced by dismissing this case. Despite plaintiffs’ impressive array of claims, the issues to be resolved were fairly simple. Plaintiffs claimed that they were wrongfully removed from the airplane. Thus, the case would likely turn on whether they were in fact forcibly removed and whether defendant had cause to do so. These issues are usually not complicated and are unlikely to be

¹³⁸ *See id.* at 170.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 171.

¹⁴¹ *See id.*

¹⁴² *See id.*

¹⁴³ *See id.*

narrowed through negotiation. While it would be beneficial if parties were willing to enter into settlement discussions in every case, failure to do so will not always warrant dismissal.

The second factor, placing the parties on notice that failure to participate could result in dismissal, was apparently satisfied by the court rule's provision alerting the parties to this possibility. Even where a local rule provides such a warning, however, until it becomes well established that failure to participate may result in dismissal, courts should advise the parties that they risk such a dismissal if they fail to comply.

The third factor asks whether a party has acted in bad faith. Here, defendant was present at the arbitration hearing, read position summaries and indicated how certain Eastern personnel would testify at trial.¹⁴⁴ While this may not represent good faith participation, it was not bad faith either. Under the circumstances of the case, monetary sanctions, but not dismissal, were appropriate.

Now consider the case under slightly different circumstances. Using the same factual scenario, assume that defendant refused to send any representative whatsoever to the arbitration hearing. Here the court would face a difficult decision. A party has deliberately refused to obey the court order commanding a representative to appear, defeating the court's efforts to effect some sort of progress in the case. However, the issues involved were not very complicated and no warning was issued to the parties that failure to participate could result in dismissal (or having judgment entered against them, as the case may be). In such a circumstance, dismissal is probably unwarranted. Although the inconvenience to the court and the complying party certainly calls for some type of sanction, the ultimate sanction of dismissal should be reserved for those cases in which the policies discussed above are most obviously advanced.

Finally, assume that: (1) the court warned the parties that failure to participate in good faith in the arbitration hearing could lead to dismissal; (2) defendant sent a representative who was generally uncooperative and made no effort to reach any type of agreement or make any progress; and (3) the case involved a claim for wrongful death on behalf of a passenger killed in a plane crash. In such a case, the legal and factual issues would be

¹⁴⁴ See *id.* at 170. In light of the arbitrator's report, defendant came dangerously close to acting in bad faith. In response to a question from the arbitrator concerning damages, defendant's attorney stated: "We don't care what you do, we won't pay it anyway." *Id.* Because defendant was willing to put forth some minimal effort, however, a finding of bad faith was unwarranted.

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very complicated. Flight recordings and remnants of the aircraft would have to be examined. Experts would be hired to investigate and discuss the causes of the crash. Trial could occupy an enormous amount of time. Under such circumstances, participation in a settlement conference or nonbinding arbitration procedure could easily serve to narrow the issues. Parties might be able to resolve issues in one day that could take weeks to litigate at trial. The court's interest in efficiently disposing of cases would surely be advanced should the parties be able to come to some conclusions. When a party deliberately defeats the efforts of the court to narrow the issues and reduce the length of trial despite a warning from the court, dismissal is not only appropriate, it is necessary if courts are to manage their overcrowded dockets. Parties involved in lengthy and complicated cases should not be allowed to occupy substantial court time without at least attempting to resolve the dispute.

V. CONCLUSION

In any case, litigants should be given every opportunity to proceed to trial. When their conduct fails to respect the judicial mechanisms designed to facilitate the speedy resolution of cases, however, the courts must be able and willing to sanction the party at fault. The nature and severity of appropriate sanctions will vary from case to case. By taking into account the goal of efficient case management, the nature of the participation by the parties and the rights and interests of the litigants involved, courts will be able to promote the fair and efficient resolution of disputes.

